

Exhibit A

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: OPTICAL DISK DRIVE
PRODUCTS ANTITRUST LITIGATION

MDL DOCKET NO M:10-2143 VRW

ALL CASES

Three sets of attorneys have applied for appointment as interim class counsel to represent a class of indirect purchaser plaintiffs in the above litigation in accordance with FRCP 23(g) (3): the Larson and Zelle groups and the Hagens Berman firm. Because their applications contain attorney work product, all three groups requested that the precise terms of their applications remain confidential during the pendency of this litigation, a request the court honors by GRANTING counsel's administrative motions to seal these proposals. Docs #47, 51 & 54.

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Pursuant to FRCP 23(g)(3), a "court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." When making such an appointment, a court must find that the applicant is adequate under FRCP 23(g)(1), which requires that the court consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Additionally, the court may consider any other matter pertinent to counsel's ability fairly and adequately to represent the interests of the class and, as the court has done here, may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and costs in representing a prospective class. FRCP 23(g)(1)(B) & (C).

With respect to attorney fees and costs, it appears that some of the statutes pursuant to which indirect purchasers seek recovery provide for shifting fees and costs in favor of a prevailing plaintiff. To the extent that a class of indirect purchaser plaintiffs obtains a recovery pursuant to a statute entitling them to fee shifting, the court will award fees and costs pursuant to that statute using the now almost universally accepted lodestar methodology. This approach makes sense in a fee shifting regime because the party against whom the award is made has an

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1 incentive to challenge any unreasonable fee or cost award,
2 affording the court the benefit of adversary presentations.

3 Not every recovery on behalf of a class of indirect
4 purchasers may be subject to a fee shifting regime for at least two
5 possible reasons: either the statute in question does not provide
6 for fee shifting or the recovery is obtained in a settlement that
7 creates a common fund. There is, of course, a third possibility:
8 the recovery may be obtained pursuant to two or more claims, one or
9 more of which provides for fee shifting while others do not. Where
10 possible, the court will attempt to determine fees based on truly
11 adversarial presentations. Because that is not always possible, it
12 is appropriate to consider the matter of fees and costs at the
13 outset. This is particularly appropriate here in which competing
14 applications have been presented by able counsel to assist the
15 court in discharging its responsibility to protect the interests of
16 the putative class. See, e.g., Gulf Oil Co v Bernard, 452 US 89,
17 100 (1981) ("Because of the potential for abuse, a district court
18 has both the duty and the broad authority to exercise control over
19 a class action and to enter appropriate orders governing the
20 conduct of counsel and parties.").

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24 Having reviewed the parties' submissions, the court finds
25 that all applicants meet the baseline requirements set forth in
26 FRCP 23(g)(1)(A)(ii) and (iii). All three parties appear to have
27 prepared their proposals independently and are experienced in
28 prosecuting complex litigation in antitrust and other areas of law;

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1 some of the lawyers in each group have appeared before the
2 undersigned in other litigation and have consistently displayed
3 high levels of skill and professionalism. The law firms
4 represented in each of the three applications, by virtue of their
5 collective experience and resources, easily satisfy the remaining
6 requirements of FRCP 23(g)(1)(A). The undersigned has previously
7 noted a number of qualitative criteria by which to evaluate the
8 quality of bids by counsel seeking to represent a class. See, e.g.,
9 In re Oracle Sec Litig, 136 FRD 639 (N.D. Cal. 1991) ("Oracle III").
10 The Zelle application claims one other such criterion when it
11 proposes to keep any settlement obtained in an escrow account
12 "until the end of the case." While this would presumably serve as
13 an incentive to conclude the entire litigation, escrowing any
14 interim settlement might discourage counsel from activities to
15 maximize recovery from other defendants. The benefit to the class
16 of escrowing interim settlements is thus difficult to predict and
17 the court gives this little weight in a qualitative evaluation of
18 the competing applications.

19 Before assessing the three applications, the court
20 briefly summarizes each proposal in general terms. All three
21 proposals describe the background of each of the firms seeking
22 designation as interim counsel. As noted, each brings impressive
23 skills and experience to the proposed task. It is difficult to
24 distinguish among the three applications on this basis. No doubt
25 realizing that their backgrounds would not point to a clear choice,
26 the three applicants devote most of their attention to their
27 respective fee and cost proposals and an analysis of the prospects
28 for a recovery. From these criteria, particularly the latter, a

1 clear choice emerges. That choice is the Hagens Berman firm.

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5 The Larson Group proposes a fee structure at the lesser
6 of a multiplier of its lodestar or a percentage fee keyed to two
7 factors: (i) the stage of the litigation at which recovery is
8 obtained, with increases in the percentage fee with each succeeding
9 stage of the litigation; and (ii) the amount of the recovery, with
10 decreases in the percentage fee as the amount of the recovery
11 increases. In addition, the Larson Group proposes a cap on
12 expenses at each of the stages of the litigation set forth in its
13 proposal. The Larson Group also requests that all parties be
14 required to sign a single protective order and electronic discovery
15 protocol, utilize a single document depository and unified document
16 identification system and adopt translation procedures—proposals
17 which the court adopts below—but it is not clear that the Larson
18 Group's application is contingent on the implementation of these
19 processes.

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21 The Zelle Group also proposes a percentage fee, but one
22 that is less keyed to litigation stages than that of either the
23 Larson or Hagens Berman proposals. The disadvantage of not
24 tailoring a percentage to the stage of the litigation at which a
25 recovery is obtained is the risk of a relatively higher percentage
26 fee charged to the class for a recovery obtained at an early stage
27 in the litigation. To be sure, the stage of litigation is not
28 precisely keyed to the amount of work entailed in obtaining a
recovery, but is probably a fairly good proxy. Thus, it would seem

1 appropriate that as the stages of the litigation advance, the
 2 percentage devoted to fees should reflect the likely greater amount
 3 of attorney work involved.¹ It is possible that the undersigned's
 4 reference to Judge Kaplan's decision in In re Auction Houses
 5 Antitrust Litig, 197 FRD 71 (SDNY 2000), may have influenced the
 6 Zelle Group to structure its fee proposal as it did. Due to the
 7 relatively low recovery at which no fee would be charged under the
 8 Zelle Group proposal, the amount of the Zelle Group's fee at
 9 substantial levels of recovery would vastly exceed the fees in the
 10 Larson and Hagens Berman proposals.

11 The Hagens Berman proposal, like that of the Larson
 12 Group, sets forth a fee percentage which increases with the stages
 13 of litigation and declines as the amount of the recovery rises.
 14 The stages of litigation set forth in the Hagens Berman proposal
 15 are very similar to those in the Larson Group proposal, all being
 16 logical steps in the litigation at which a recovery, if there is to
 17 be one, is likely to be obtained. These proposals thus afford
 18 enhanced compensation to the lawyers as the likely amount of work
 19 involved in securing a recovery increases (and provides for a lower
 20 fee for early stage recoveries). In this regard, the Larson and
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23 ¹While others have argued for an increasing fee award as amount of the
 24 award increases, see, e.g., Jill E Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 Colum L Rev 650, 679 (2002) ("The increasing percentage bid structure better addresses the moral hazard problem. By increasing the reward to counsel, increasing percentage bids reduce the incentive for cheap settlements and motivate counsel to pursue high levels of recovery."), this court is not convinced
 25 that an increasing award structure would inure to the benefit of the class.
 26 In such cases, the class, which would be shouldering more risk in passing
 27 up an early settlement offer, would ultimately receive less reward. Even
 28 increasing fee advocates, however, recognize that "[i]ncreasing fees are particularly problematic in cases[, such as this,] in which the court cannot readily predict the recovery at the time it selects counsel." Id.

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1 Hagens Berman proposals are superior to the Zelle proposal.

2 The Zelle and Larson groups also propose a monetary cap
3 on deduction from the class's recovery for out-of-pocket expenses.
4 The Hagens Berman proposal entails one fee that covers both
5 compensation of attorneys and reimbursement of attorneys' out-of-
6 pocket expenses. The court notes that expense caps of the Larson
7 and Zelle proposals may be more problematic for the class than
8 simply folding expense recovery into the fee as Hagens Berman
9 proposes. As expenses approach the expense cap, the existence of a
10 cap might serve as a deterrent to incur the expense even if to do
11 so might be in the class's interest. The overall fee and expense
12 pool approach, on the other hand, avoids or, at least, militates
13 against this potential conflict. Furthermore, to the extent that
14 services paid for by out-of-pocket expenditures and attorney inputs
15 are substitutes one for the other, a reimbursement regime which
16 promises one hundred cents on the dollar (full recovery) tends to
17 encourage those expenditures relative to compensation keyed to a
18 percentage of recovery. The Hagens Berman proposal thus tends to
19 put class counsel's evaluation of attorney and non-attorney inputs
20 on the same plane and affords an incentive to seek the optimal mix
21 of the two.

22 The court, in requesting bids from prospective counsel
23 seeking recovery on behalf of indirect purchaser plaintiffs,
24 understood fully that counsel, at this early stage of litigation,
25 have limited information concerning the probability of a recovery
26 and the amount or range of such recovery. By contrast, plaintiffs'
27 counsel in a fraud-on-the-market securities class action typically
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1 have more readily available information to size up potential
2 recovery than do counsel here. The price movement of the security
3 in question is known and the alleged unlawfully undisclosed or
4 misstated information that distorted the price of the stock has
5 come into the market when the typical fraud-on-the-market case
6 commences. While the amount of the price distortion and the period
7 of distortion may not be completely apparent at the onset of a
8 fraud-on-the-market class action, experienced counsel are
9 nevertheless able to make reasonably astute estimates of the value
10 of such litigation. By contrast, potential recovery by indirect
11 purchaser plaintiffs in this litigation is subject to a greater
12 variety of imponderables. Nonetheless, Hagens Berman has presented
13 a very impressive array of possible recovery scenarios that suggest
14 a high level of analysis of potential recoveries. This feature is
15 what most distinguishes the Hagens Berman application from the
16 others.

17 The fee proposals likewise favor Hagens Berman. As noted
18 above, the expense caps proposed by the Zelle and Larson Groups
19 give the court some hesitation. The approach taken by Hagens
20 Berman, which seeks to fold expenses into a total fee and expense
21 deduction, is preferable. Although Hagens Berman's declining
22 percentage fees at the larger recovery amounts may be less than the
23 Larson or Zelle Groups' proposal, as a practical matter the Larson
24 Group's lodestar multiplier cap may make it the lowest cost
25 proposal—at least for some recovery amounts. But this slight
26 advantage is outweighed by the overall quality and relative
27 sophistication of Hagen Berman's analysis of the potential recovery
28 that indirect purchaser plaintiffs may achieve.

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For these reasons, after reviewing all three high-quality proposals, the court finds that Hagens Berman will best be able to represent the interests of the indirect purchaser plaintiffs as interim class counsel in the above-captioned matter. The court therefore APPOINTS the Hagens Berman firm as interim class counsel for indirect purchaser plaintiffs pursuant to FRCP 23(g) (3). Appointment of class counsel pursuant to FRCP 23(g) (1) will be made when and if a class of indirect purchaser plaintiffs is certified. As interim counsel, the Hagens Berman firm may coordinate its efforts with additional counsel pursuant to its proposal and shall identify, in a letter to the court submitted on or before June 18, 2010, a discovery coordinator.

Additionally, the court ADOPTS the administrative procedures put forth by the Larson Group. Absent further order of court, on or before August 1, 2010, the parties are ORDERED to meet and confer in order to execute a single protective order and electronic discovery protocol, to establish a single document depository and unified document identification system and to adopt translation procedures.

IT IS SO ORDERED



VAUGHN R WALKER
United States District Chief Judge